FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. DENIS WILLIAM KRAEMER, JR. (CRD No. 2795687), Respondent.	Disciplinary Proceeding No. 2006006192901 **HEARING PANEL DECISION** Hearing Officer -- SW Date: December 15, 2008

Respondent is suspended in all capacities from associating with any FINRA member for nine months and fined $5,000 for his willful failure to disclose his criminal history on his Form U4s, in violation of Conduct Rule 2110 and IM-1000-1.

Appearances

Frank M. Weber, Esq., Senior Regional Counsel, and Lara Thyagarajan, Esq., Senior Regional Counsel, New York, NY, for the Department of Enforcement.

John E. Lawlor, Esq., Mineola, NY, for Respondent Denis William Kraemer, Jr.

DECISION

I. PROCEDURAL HISTORY

A. Complaint and Answer

On April 21, 2008, the FINRA Department of Enforcement ("Enforcement") filed a one-count Complaint against Respondent Denis William Kraemer, Jr. ("Respondent"). The Complaint alleges that Respondent violated Conduct Rule 2110 and IM-1000-1 by willfully failing to disclose his 2001 criminal history on his March 27, 2002 Form U4 and April 2, 2002 Form U4 amendment filed through PHD Capital ("PHD Capital"), and on his September 1, 2006 Form U4 filed through J.H. Darbie & Co., Inc. ("J.H. Darbie").

Respondent admitted that he failed to disclose his 2001 criminal history on two Form U4s and on a Form U4 amendment, but argued that his failures to disclose the information were not willful or intentional. Rather, he argued that, having relied on his supervisors and superiors to advise him, he mistakenly believed that such disclosure was not required.

B. Hearing

The Hearing Panel, consisting of two current members of the District 10 Committee and a Hearing Officer, conducted a Hearing in New York, NY, on October 2, 2008.[1]

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Facts

1. Respondent

Respondent first became associated with a FINRA member in August 1996 when he was briefly employed by Alden Capital Markets, Inc. (CX-1, p. 8). On August 12, 1999, Respondent became registered as a general securities representative with D.L. Cromwell Investments, Inc. (*Id.*). Subsequently, Respondent was registered with Cambridge Capital, LLC, Continental Broker-Dealer Corp., and Northridge Capital Corporation. (CX-1, pp. 6-7).

From April 19, 2002 to August 30, 2006, Respondent was registered as a general securities representative with PHD Capital. (CX-1, p. 6; Stip. at ¶ 2). Currently,

[1] "Tr." refers to the transcript of the Hearing held on October 2, 2008; "CX" refers to the exhibits submitted by the Department of Enforcement; and "Stip." refers to the joint stipulations filed by the Parties.

Respondent is registered as a general securities representative with J.H. Darbie. (CX-1, p. 5; Stip. at ¶ 3).

2. Respondent's 2001 Criminal History

On December 11, 2001, Respondent was arrested and charged with stealing two sets of Tommy Hilfiger cologne valued at $140 from Macy's department store in New York City. (CX-2, pp. 1-2; Stip. at ¶ 5; Tr. p. 103). Ultimately, Respondent was charged with petit larceny and criminal possession of stolen property. (CX-2, p. 2; Stip. at ¶ 6).

On December 12, 2001, Respondent pled guilty and was convicted of petit larceny. (Tr. p. 104). Respondent was sentenced to a one-year period of conditional discharge to expire on December 12, 2002, and required to complete a two-day drug treatment program or spend 30 days in jail.[2] (CX-2, p. 4; CX-3, p. 3; Stip. at ¶ 7; Tr. p. 106).

Later that same day, Respondent's defense counsel unsuccessfully attempted to persuade the judge to vacate the plea bargain because of Respondent's concern about the impact of the guilty plea on Respondent's securities license.[3] (CX-3, p. 4; Tr. p. 108).

The 2001 arrest and conviction were not Respondent's first involvement with the criminal justice system. (Stip. at ¶ 4). Previously, Respondent had been charged and convicted of a number of misdemeanors, including: (i) marijuana possession in 1998; (ii) marijuana possession and driving while impaired in 1992; and (iii) stealing $15 worth of gasoline in 1992. (*Id.*).

[2] Respondent successfully completed the two-day drug treatment program. (Tr. p. 108).

[3] The court rejected the request to vacate Respondent's guilty plea. (CX-3, pp. 4, 6; Tr. p. 142).

3. Respondent's Completion of the Form U4s

On March 13, 2002, approximately four months after his arrest and conviction in December 2001 and the completion of his court mandated rehabilitation sessions, but eight months before the completion of his conditional discharge, Respondent sought employment and completed a Form U4 to become registered as general securities representative with PHD Capital. (CX-4; Stip. at ¶ 9).

During the employment process, Respondent advised PHD Capital that he had several misdemeanor charges and convictions, but stated that he did not remember the dates for any specific charges or convictions. (CX-15, pp. 23-24, subpages 49-50; Tr. pp. 120-122, 148). Respondent testified that PHD Capital's compliance officer advised Respondent that he had access to Respondent's criminal history and could obtain that information. (CX-15, p. 24, subpage 50). Respondent testified that he concluded that the 2001 event was non-discloseable because PHD Capital's compliance officer provided details about his other charges and convictions, but not the 2001 charge and conviction. (CX-15, pp. 24-25, subpage 50-51; Tr. pp. 120-121).

On his March 13, 2002 Form U4, handwritten by Respondent, he indicated "yes" to questions about whether he had ever been charged or convicted of misdemeanor theft. (CX-4, p. 9). Based on the information provided by PHD Capital's compliance officer, Respondent listed on the Form U4's criminal disclosure reporting page ("DRP") the following charges and convictions: (i) criminal possession of marijuana in the 5th degree in 1998; (ii) driving while impaired and unlawful possession of marijuana in 1992; and (iii) petit larceny involving $15 of gasoline in 1992. (CX-4, pp. 20-21; Stip. at ¶ 11; Tr. pp. 64, 119, 121, 138).

Respondent admitted that he remembered the recent 2001 misdemeanor charge and conviction when he completed his Form U4, but claimed he did not list them on the Form U4's criminal DRP because PHD Capital's compliance officer had not provided Respondent with any information regarding the 2001 charge and conviction. (Tr. pp. 87, 114, 122). Respondent also admitted that he did not mention the 2001 charge and conviction to PHD Capital's compliance officer or ask him whether he was required to disclose them. (Tr. p. 122).

In March 2002, FINRA revised the format of the Form U4. (Tr. p. 52). Accordingly, PHD Capital did not submit the March 13, 2002 Form U4 to FINRA; rather PHD Capital prepared and filed a Form U4 for Respondent in the new format, which Respondent signed on March 27, 2002. (CX-5; Stip. at ¶ 13). Although the March 27, 2002 Form U4 incorrectly answered "no" to Questions 14B(1)(a) and (1)(b) regarding whether Respondent had ever been charged or convicted of a misdemeanor involving taking of property, the Form U4's criminal DRP did list the 1992 misdemeanor conviction for the theft of $15 of gasoline.[4] (CX-5, pp. 7, 13; Stip. at ¶ 15).

On April 2, 2002, PHD Capital filed an amendment to Respondent's Form U4 that correctly responded "yes" to Questions 14B(1)(a) and (1)(b), but still only disclosed the 1992 misdemeanor conviction, and not the 2001 misdemeanor charge and conviction. (CX-6, pp. 8, 11-12; Stip. at ¶ 18). When signing the April 2, 2002 Form U4 amendment, Respondent again did not disclose his most recent 2001 criminal charge and conviction to PHD Capital's compliance officer. (Tr. p. 122). During the approximately

[4] Respondent was not required to disclose the criminal possession of marijuana and driving while impaired misdemeanor charges and convictions on the Form U4.

four years Respondent was employed by PHD Capital, the issue of the 2001 criminal charge and conviction was never raised by Respondent or by PHD Capital. (Tr. p. 137).

On September 1, 2006, Respondent completed and signed a Form U4 to become registered as a general securities representative with J.H. Darbie. (CX-10, pp. 1, 3, 15; Stip. at ¶ 21). J.H. Darbie filed the Form U4 with FINRA on behalf of Respondent on September 7, 2006. (CX-1, p. 5). The Form U4 correctly responded "yes" to Questions 14B(1)(a) and (1)(b), but once again only listed the 1992 misdemeanor theft charge and conviction, omitting the 2001 misdemeanor charge and conviction. (CX-10, pp. 9, 15-16).

Respondent testified that he disclosed to J.H. Darbie that he had numerous arrests and a pending arbitration, but he "didn't even think" about the 2001 criminal charge and conviction when he spoke to J.H. Darbie's managers. (Tr. pp. 132-133). Respondent stated that when he later thought about the 2001 charge and conviction, he believed that because PHD Capital had not reported the 2001 charge and conviction with conditional discharge, they were "squashed." (Tr. p. 134).

On September 19, 2006, based on a fingerprint check, FINRA issued a criminal report to J.H. Darbie disclosing Respondent's 2001 misdemeanor theft charge and conviction. (CX-11, pp. 1, 6; Stip. at ¶ 24). On September 25, 2006, Respondent amended his Form U4 to list his 2001 misdemeanor theft charge and conviction on the Form U4's criminal DRP. (CX-12; Stip. at ¶ 26).

B. Respondent Violated Conduct Rule 2110 and IM-1000-1

The Complaint alleges that Respondent violated Conduct Rule 2110 and IM-1000-1 by willfully failing to disclose on his Form U4s and Form U4 amendment that:

(i) on December 11, 2001, Respondent was charged with two misdemeanors, petit larceny and criminal possession of stolen property in the 5th degree; and (ii) on December 12, 2001, he pled guilty and was convicted of petit larceny, a misdemeanor theft of property.

The Securities and Exchange Commission has held that misrepresentations on an application for registration violate the standards of just and equitable principles of trade of Conduct Rule 2110 to which every person associated with any FINRA member is held.[5] Article V, Section 2 of FINRA's By-Laws requires all applicants to fully and accurately disclose all requested information on the Form U4. Article V, Section 2(c) of the FINRA By-Laws, Conduct Rule 2110, and IM-1000-1[6] require associated persons to answer the Form U4's questions accurately.

Respondent had an obligation to fully disclose the nature of his 2001 criminal charge and conviction. If Respondent did not remember the exact date and nature of the arrest and conviction, he could have told the compliance officer that he had been arrested and convicted of theft the prior year, and either he or the compliance officer could then have obtained the necessary details to complete the DRP. In any event, "[t]he violation of providing false information to [FINRA] requires only that the complainant prove that the information was false."[7] It is undisputed that Respondent's Form U4s were false, in that they omitted the 2001 arrest and conviction. Accordingly, the Hearing Panel finds

[5] *Robert E. Kauffman*, Exch. Act Rel. No. 33,219 (Nov. 18, 1993), *aff'd*, *Robert E. Kauffman v. SEC*, 40 F.3d 1240 (3rd Cir. 1994).

[6] IM-1000-1 provides that "[t]he filing with [FINRA] of information with respect to membership or registration as a Registered Representative which is incomplete or inaccurate so as to be misleading, or which could in any way tend to mislead, or the failure to correct such filing after notice thereof, may be deemed to be conduct inconsistent with just and equitable principles of trade . . ."

that Respondent violated Conduct Rule 2110 and IM-1000-1 by failing to disclose his 2001 criminal history.

Enforcement argued that Respondent's failure to disclose his criminal history was willful. Willfulness is not required to establish the violation charged; as explained above, it is enough that Respondent failed to list the 2001 criminal charge and conviction on the Form U4's criminal DRP.

A finding that Respondent's failure was willful, however, would have serious collateral consequences. Section 15(b)(4)(A) of the Securities Exchange Act of 1934 states that a person who files an application for association with a member of a self-regulatory organization and who "willfully" fails to disclose "any material fact which is required to be stated" in that application is statutorily disqualified from participating in the securities industry.[8] Article III, Section 4 of FINRA's By-Laws, as amended on July 30, 2007, gives effect to this by providing that a person is subject to a "disqualification" with respect to association with a member firm if such person is subject to any "statutory disqualification" as such term is defined in the Securities Exchange Act of 1934.[9]

To find that Respondent's failure to disclose his 2001 criminal charge and conviction was willful, the Hearing Panel need not find that Respondent intended to

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[7] *Dist. Bus. Conduct Comm. v. Prewitt*, No. C07970022, 1998 NASD Discip. LEXIS 37, at *7 (NAC Aug. 17, 1998).

[8] Under Article III, Section 3(b) of FINRA's By-Laws, a "statutorily disqualified" person cannot become or remain associated with a FINRA member unless the disqualified person's member firm applies for relief from the statutory disqualification under Article III, Section 3(d) of the By-Laws.

[9] Former Article III, Section 4(f) of FINRA's By-Laws had essentially the same language as Section 15(b)(4)(A) of the Securities Exchange Act of 1934, stating that a person is subject to a "disqualification" if such person "has willfully made or caused to be made in any application … to become associated with a member … any statement which was at the time, and in light of the circumstances under which it was made, false or misleading with respect to any material fact, or has omitted to state in such application … any material fact which is required to be stated therein."

violate a specific rule or law; rather, the Hearing Panel need only find that Respondent "knew or reasonably should have known under the particular facts and circumstances that his conduct was improper."[10]

Enforcement asserts that the Respondent's failure to disclose was willful because he knew or should have known that it was wrong to fail to disclose the 2001 misdemeanor charge and conviction on his Form U4's criminal DRP.

Respondent argued that he assumed that he did not need to disclose the 2001 charge and conviction because PHD Capital's compliance officer did not provide him with any information concerning the 2001 charge and conviction when discussing Respondent's required Form U4 disclosures. (Tr. p. 120). Since Respondent believed that PHD Capital's compliance officer had access to his entire criminal history, Respondent thought that PHD Capital's compliance officer would have known about the 2001 charge and conviction and would have provided Respondent with the necessary information to complete the DRP page of the Form U4 if the 2001 charge and conviction were required to be disclosed.

The Hearing Panel rejected this argument. As a registered representative, Respondent "is responsible for his actions and cannot shift that responsibility to the firm or his supervisors."[11] Respondent knew about his 2001 arrest and conviction. By simply reading the questions on the Form U4, Respondent should have known he had to disclose the charge and conviction. At a minimum, he should have specifically asked the compliance officer about his obligation to disclose those events. "[FINRA], which

[10] *Christopher LaPorte*, Exch. Act Rel. No. 39,171, 1997 SEC LEXIS 2058, at *8 n. 2 (Sept. 30, 1997); *Dep't of Enforcement v. Knight*, No. C10020060, 2004 NASD Discip. LEXIS 5 at *9-10 (NAC April 27, 2004).

cannot investigate the veracity of every detail in each document filed with it, must depend on its members to report to it accurately and clearly in a manner that is not misleading."[12]

Respondent also argued that in 2002, it was hard for him to understand all the questions on the Form U4 at that particular time in his life because he was still "very foggy."[13] (Tr. pp. 109, 117). Being "foggy" is not an excuse for filing an inaccurate Form U4. Moreover, although Respondent testified that he was foggy when he completed his Form U4 in March 2002, he also testified that after the December 2001 arrest and conviction he went into the Crisis Center, and that December 15, 2001 was his first day of sobriety and the day he completely turned his life around. (Tr. pp. 140-141, 148-149).

The Hearing Panel finds that Respondent (i) read and was aware of the Form U4's questions regarding an applicant's criminal history, (ii) was aware of his 2001 misdemeanor charge and conviction at the time that he completed the PHD Capital Form U4 and Form U4 amendment, and (iii) recklessly decided not to mention, list, or specifically disclose his 2001 criminal history. The Hearing Panel also notes that Respondent was aware of the significance of the 2001 charge and conviction to his securities license because after his arrest and conviction, Respondent attempted to vacate his guilty plea because of a concern about the impact on his securities license. Accordingly, the Hearing Panel finds that with respect to PHD Capital, Respondent knew or should have known that his failure to disclose his 2001 criminal history on his Form

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[11] *See Rafael Pinchas*, Exch. Act Rel. No. 41,816, 1999 SEC LEXIS 1754, at *14 (Sept. 1, 1999).

[12] *Id*.

U4 and Form U4 amendment was wrong, and therefore his failure to disclose was willful.[14]

III. SANCTIONS

For filing a false, misleading, or inaccurate Form U4, the *FINRA Sanction Guidelines* recommend a fine ranging from $2,500 to $50,000, as well as the consideration of a five to 30 business-day suspension in all capacities.[15] In egregious cases, such as those involving habitual misconduct, the *Guidelines* suggest that a longer suspension of up to two years, and possibly a bar, may be appropriate.[16]

A Form U4 is fundamental to the business and integrity of the securities industry. It is "used by all the self-regulatory organizations, including [FINRA], state regulators, and broker-dealers to monitor and determine the fitness of securities professionals,"[17] and "serves as a vital screening device for hiring firms and [FINRA] against individuals with 'suspect history.'"[18] "The candor and forthrightness of applicants is critical to the effectiveness of this screening process."[19]

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[13] At the time of his arrest and conviction, Respondent was battling a drug addiction. (Tr. p. 143).

[14] Because the Hearing Panel finds that Respondent's failure to disclose his 2001 criminal history on his PHD Capital Form U4s was willful, the Panel need not determine whether his failure to disclose his 2001 criminal history on his J.H. Darbie Form U4 was also willful.

[15] *FINRA Sanction Guidelines*, p. 73 (2007), available at http://www.finra.org/web/groups/industry/@ip/@enf/@sg/documents/industry/p011038.pdf.

[16] *Id.* at 74.

[17] *Rosario R. Ruggiero*, Exch. Act Rel. No. 37,070, 1996 SEC LEXIS 990, at *8-9 (Apr. 5, 1996).

[18] *Prewitt*, 1998 NASD Discip. LEXIS 37, at *8. *See also, e.g., Thomas R. Alton*, Exch. Act Rel. No. 36,058, 1995 SEC LEXIS 1975, at *4 (Aug. 4, 1995).

[19] *Alton*, 1995 SEC LEXIS 1975, at *4. *See also, e.g., Dist. Bus. Conduct Comm. v. Perez*, No. C10950077, 1996 NASD Discip. LEXIS 51, at *7 (NAC Nov. 12, 1996) ("Full and accurate disclosures on a Form U4 are critical to the securities industry because member firms must be able to assess properly whether an individual should be employed, and, if so, subject to enhanced supervision.").

The *Guidelines* suggest three principal considerations in determining sanctions: (1) the nature and significance of information at issue; (2) whether the omission resulted in a statutorily disqualified person becoming associated with a firm; and (3) whether the misconduct harmed a registered person, a firm, or anyone else.[20] Relevant general considerations include: (1) whether the misconduct occurred over an extended period of time; and (2) whether the misconduct was intentional.[21]

Enforcement requested a suspension of nine months in all capacities and a $5,000 fine for Respondent's failure to disclose his criminal history on his FormU4s. Respondent argued that any sanctions should not exceed a thirty-day suspension and a $2,500 fine.

The Hearing Panel finds that the information regarding Respondent's criminal history was significant information for both the public and his employers because although the value of the stolen property was not significant, the theft occurred less than four months before he began working at PHD Capital. In contrast, the theft of $15 of gasoline, which he did disclose on his Form U4, happened approximately 10 years earlier. The Hearing Panel also finds that Respondent's failure to disclose his 2001 criminal charge and conviction was reckless.

The Hearing Panel, however, also finds that Respondent's misconduct lacked two aggravating factors, *i.e.*, the failure to disclose did not result in a statutorily disqualified

[20] *Guidelines* at 73 (2007).

[21] *Id.* at 6-7.

person becoming associated with either PHD Capital or J.H. Darbie, and there was no evidence of harm caused by the failure to disclose.[22]

Accordingly, the Hearing Panel finds that Enforcement's recommendation is an appropriate sanction and hereby suspends Respondent from associating with any FINRA member for nine months in all capacities and fines him $5,000 for willfully failing to disclose his 2001 criminal history on his Form U4s, in violation of Conduct Rule 2110 and IM-1000-1.[23]

IV. CONCLUSION

For his willful failure to disclose his criminal history on his Form U4s, in violation of Conduct Rule 2110, and IM-1000-1, Respondent is suspended from associating with any FINRA member firm in any capacity for nine months and fined $5,000. In addition, Respondent is ordered to pay Hearing costs of $2,164.72, which include a $750 administrative fee and a $1,414.72 transcript fee.

These sanctions shall become effective on a date set by FINRA, but not earlier than 30 days after this decision becomes FINRA's final disciplinary action in this matter, except that if this decision becomes FINRA's final disciplinary action, the suspension

[22] *Dept. of Enforcement v. Zdzieblowski*, Complaint No C8A030062, 2005 NASD Discip LEXIS 3, at *18 (NAC May 3, 2005) (finding the misdemeanor charge itself would not have resulted in respondent's statutory disqualification, and there being no evidence in the record that respondent's nondisclosure resulted in any customer harm, the NAC fined respondent $5,000 and suspended him for one year for failing to disclose on his Form U4 his misdemeanor charge involving the taking of property).

[23] Because the Hearing Panel finds that Respondent willfully failed to state on his Form U4 material facts required to be stated therein, Respondent is deemed statutorily disqualified pursuant to Article III, Section 4 of the FINRA By-Laws and Section 3(a)(39)(F) of the Securities Exchange Act of 1934. Under Article III, Section 3(b) of FINRA's By-Laws, a "statutorily disqualified" person cannot become or remain associated with an FINRA member unless the disqualified person's member firm applies for relief from the statutory disqualification under Article III, Section 3(d) of the By-Laws.

shall begin at the opening of business on February 2, 2009, and end on November 1, 2009.[24]

HEARING PANEL.

By:_____
Sharon Witherspoon
Hearing Officer

Dated: Washington, DC
December 15, 2008

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[24] The Hearing Panel considered and rejected without discussion all other arguments of the Parties.